

The Interaction of Constitutional Privilege and Statutory Immunity in Bankruptcy Examinations

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I. INTRODUCTION

Fulfillment of the Bankruptcy Act's objective of securing equitable settlement of insolvent estates creates an obvious need for many types of information. Were the bankrupt made to reveal all transactions into which he entered in the years preceding the adjudication of his insolvency, a court might achieve maximum protection against secret preferences and concealed assets. Balanced against this need for information, however, must be the fundamental constitutional guarantee that no natural person shall be compelled to make disclosures which may subject him to criminal sanction.¹ Thus, the debtor who has evaded taxes, used the mails fraudulently, or obtained goods on false credit could ordinarily not be made to testify concerning any aspect of these activities.²

Section 7(a)(10)³ of the Bankruptcy Act provides the mechanism for acquiring information from the bankrupt. The bankrupt shall at the first meeting of his creditors, at the hearing upon objection, if any, to his discharge and at such other times as the court shall order, submit to an examination. Apparently recognizing the fifth amendment impediment to full disclosure, Congress, in addition to providing for examination of the bankrupt, included a provision for insulating testimony of the debtor from use in subsequent criminal proceedings as early as the Bankruptcy Act of 1898.⁴ The revisions of the statutory scheme undertaken in the 1938 Chandler Act continued this grant of

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1. U.S. CONST. amend. V.

2. The general nature of the proscription found in the mail fraud statute renders many bankrupts quite vulnerable to prosecution under it, for an indictment is sustainable merely on the allegation that the debtor used the mails to secure merchandise upon knowingly inaccurate representations as to his financial condition. See, e.g., *Czarlinsky v. United States*, 54 F.2d 889 (10th Cir. 1931); *United States v. Hoyt*, 53 F.2d 881 (S.D.N.Y. 1931). The temptation to misstate resources is probably significant for the individual attempting to restore financial stability to his business.

3. 11 U.S.C. § 25(a)(10) (1964).

4. 30 Stat. 548 (1898).

immunity in substantially unaltered form in section 7(a)(10):⁵ "no testimony given by [the bankrupt] shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge."

Even before this immunity provision was introduced into bankruptcy proceedings, the Supreme Court announced in *Counselman v. Hitchcock*⁶ that the constitutional privilege against self-incrimination could be abridged by legislative action only if the substituted immunity "is so broad as to have the same extent in scope and effect" as the right which it supplants.⁷ The practical effect of this pronouncement for bankruptcy proceedings is to preserve to the debtor the right to refuse to testify to any incriminating matter not insulated from possible use in future criminal trials⁸ by section 7(a)(10). Every limitation placed on the scope of the immunity grant by subsequent judicial interpretations represents an impediment to the bankruptcy court's efforts to gain full disclosure of the debtor's past transactions.⁹ However, in addition to restricting the scope of the section 7(a)(10) insulation, judicial decisions have added new breath to the fifth amendment guarantee. This contraction of the immunity grant and simultaneous expansion of the fifth amendment privilege will be reviewed in the remainder of this Article. Particular emphasis will be given to those recent decrees which may suggest that a significant need exists for congressional re-evaluation of the contemporary effectiveness of the statutory attempt to insure full disclosure in bankruptcy proceedings.

II. INDIRECT USE OF ACQUIRED EVIDENCE

One characteristic of the fifth amendment privilege against self-incrimination which has long been recognized is its applicability to any matter "which might furnish a clue or a link in a

5. 11 U.S.C. § 25(a)(10) (1964).

6. 142 U.S. 547 (1892).

7. *Id.* at 585.

8. See, e.g., *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *United States v. Lawson*, 255 F. Supp. 261 (D. Minn. 1966); *In re Nachman*, 114 F. 995 (D.S.C. 1902).

9. It is imprecise, however, to view the "universe" of incriminating statements of a bankrupt as totally occupied by the mutually exclusive concepts of immunity and privilege, for incriminations will be unprotected if they are revealed in the debtor's books and records, see *In re Harris*, 221 U.S. 274 (1911), or if either the privilege or immunity is waived. Compare *In re Bendheim*, 180 F. 918 (S.D.N.Y. 1910) with *Bain v. United States*, 262 F. 664 (6th Cir. 1920).

chain of evidence by which a criminal offense might be made known."¹⁰ Thus, the defendant not only could refuse to give testimony which itself might be introduced against him, but also could remain silent when his disclosures might be utilized by investigating officers to uncover other evidence of an alleged criminal offense. Early construction of the Bankruptcy Act resulted in findings that its immunity grant did not encompass insulation from this indirect incrimination. Rather, in reviewing the statutory language, courts found that only subsequent introduction of the bankrupt's oral utterances was proscribed.¹¹ In view of this limited application of the immunity grant, the *Counselman* mandate of the mutual exclusiveness of immunity and constitutional privilege could be given effect only by reaffirmation of the bankrupt's right to refuse to make any statement which might be used to unearth other evidence. This combination of interpretations, while probably consistent with the intent reflected in the congressional choice of language, was in many instances fatal to the purpose of insuring that officers of the bankruptcy court were privy to facts which would facilitate equitable distribution of an estate; for it would appear that most direct disclosures by the bankrupt of illicit associations or business activities would yield sources for additional incriminating discoveries. For example, suppose a bankrupt who had been engaged in unlawful liquor production were asked to reveal the identity of a creditor to whom he had made certain large payments prior to insolvency. Since revealing a source of supply of his operation may lead Treasury Department investigators to other evidence which would support a tax evasion indictment, the bankrupt could properly refuse to answer even the threshold question of the supplier's identity. In this situation, the referee is confronted with the possibility of a preferential debt payment but is left without adequate procedures through which to insure the sort of recapture and distribution of these assets contemplated by the Bankruptcy Act. Thus, the incompleteness of the immunity grant precludes even the receipt of much direct testimony which would ostensibly appear to be immunized under section 7(a) (10).

A judicial solution to the referee's dilemma might be borrowed from criminal law precedents. Rather than compelling

10. *Edelstein v. United States*, 149 F. 636, 642 (8th Cir. 1906). See also *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Boyd v. United States*, 116 U.S. 616 (1886).

11. See *Edelstein v. United States*, 149 F. 636 (8th Cir. 1906); *In re Nachman*, 114 F. 995, 996 (D.S.C. 1902).

the bankrupt's invocation of his constitutional privilege, and accepting the concomitant frustration of the Act's purpose, an exclusionary rule could treat the debtor's testimony in the same manner as an involuntary utterance of a criminal defendant and prohibit the introduction of the "fruits" thereof in subsequent proceedings.¹² Thus, when the indirectly-revealed evidence was presented at a criminal trial, the bankrupt could object that it had previously been immunized. In effect, this proposal represents a call for a judicial broadening of the current statute and is opened to the obvious objection that such a fundamental alteration should be undertaken only through the legislature, the body responsible for the present statutory weaknesses. Further, since, to date, no definitive specification has been made of the extent to which bankruptcy investigations are hindered by the present limits of the immunity statute, a legislative hearing would appear to be an appropriate forum in which to gather the opinions of the referees and judges who give section 7(a)(10) its practical application.

One avenue for congressional remedy of the statute's current infirmity would entail an addition to section 7(a)(10) to the effect that no testimony will be used "either directly or indirectly" against the bankrupt in a subsequent trial.¹³ Yet, this alteration is probably not a very likely subject of congressional consideration in the near future. While Congress has amended the Bankruptcy Act on several occasions subsequent to the judicial establishment of the debtor's right to invoke his privilege against indirect use,¹⁴ there has been no attempt to expand the existing scope of section 7(a)(10) immunity.

12. See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963).

13. Several state immunity statutes provide against subsequent "direct or indirect" use, e.g., ALA. CODE tit. 29, § 113 (1958); N.H. REV. STAT. ANN. § 15:7 (1955), and are thought to intend that testimonial fruits are thereby immunized. See Comment, *State Immunity Statutes in Constitutional Perspective*, 1968 DUKE L.J. 311, 324.

14. Many of the weaknesses of the immunity proviso of the Bankruptcy Act were exposed shortly after it was first adopted in 1898. See, e.g., *Ensign v. Pennsylvania*, 227 U.S. 592 (1913) (immunity does not extend to § 7 schedules); *In re Hooks Smelting Co.*, 138 F. 954 (E.D. Pa. 1905) (immunity grant inapplicable in § 21a examinations); *In re Nachman*, 114 F. 995 (D.S.C. 1902) (immunity grant does not insulate against subsequent use of fruits of bankrupt's testimony). Yet, in 1938 when Congress was considering the changes proposed in the Chandler Amendment, it failed to expand the coverage of the immunity provision and merely re-enacted the original language. See notes 4 and 5 *supra* and accompanying text. Some courts have viewed this re-enactment as implicit approval of the judicial interpretations given the original statute. See, e.g., *Meer v. United States*, 235 F.2d 65 (10th Cir. 1956).

III. USE OF BANKRUPT'S TESTIMONY IN STATE PROCEEDINGS

Until recently, the section 7(a)(10) immunity grant was seriously deficient in that it failed to insulate a bankrupt's testimony from use in a state criminal proceeding. An early case raised the question of whether, in light of the immunization offered by the Act, a debtor could refuse to give testimony which could promote his conviction in a pending state proceeding.¹⁵ Accepting the *Counselman* pronouncement that legislative immunity must afford the same protection that could have been claimed by an assertion of the fifth amendment privilege,¹⁶ the court noted that the bankruptcy statute did not purport to grant interjurisdictional immunity and that, therefore, the bankrupt could refuse to make any utterance which might be used against him in a state prosecution.¹⁷ In view of the temptation of a financially unstable person to avoid local taxes, criminally misrepresent assets to creditors, or otherwise seek economic equilibrium through illegal means, the effect of this holding was significant; for it allowed the bankrupt to withhold any information which, if revealed, could reasonably be expected to be used to support, either directly or indirectly, a state prosecution.

Although other bankruptcy cases accepted this view,¹⁸ federal pronouncements in other areas of the law indicated that a claim of state incrimination would not support invocation of the federal constitutional privilege as long as the fifth amendment was inapplicable in local courts.¹⁹ The implicit rationale was that as long as the fifth amendment was inapplicable to the states, there was no need to extend the immunity grant to state prosecution.

This conflict between bankruptcy and general criminal law precedents, although not resolved, was rendered irrelevant by two Supreme Court decisions in 1964. In *Malloy v. Hogan*,²⁰ the fifth amendment guarantee was extended to litigants in state proceedings. Were this extension not considered in the context of immunity grants, it might appear that the early bankruptcy cases had been correct in allowing a claim of the privilege to prevent local use of testimony. On the same day the Court

15. *In re Scott*, 95 F. 815 (W.D. Pa. 1899).

16. See note 6 *supra* and accompanying text.

17. 95 F. 817.

18. See, e.g., *In re Hess*, 134 F. 109, 112 (E.D. Pa. 1905); *In re Nachman*, 114 F. 995 (D.S.C. 1902).

19. See, e.g., *United States v. Murdock*, 284 U.S. 141 (1931).

20. 378 U.S. 1 (1964).

decided *Malloy*, however, it decreed in *Murphy v. Waterfront Commission*²¹ that a judicially imposed exclusionary rule would prohibit extrajudicial use of immunized testimony. Thus, in order to gain the full breadth of constitutional protection, the bankrupt need no longer invoke the fifth amendment privilege to avoid incrimination in a state proceeding. *Murphy* extends the immunity grant to state proceedings, thus prohibiting a state's use of testimony given in a bankruptcy action pursuant to section 7(a)(10).

The precise impact of *Murphy* on bankruptcy proceedings has not yet been litigated, but it appears that the Court's reliance on an exclusionary rule will appreciably broaden the types of testimony which can be compelled. If the Bankruptcy Act is viewed as an attempt to provide federal pre-eminence in the distribution of insolvent estates, the *Murphy* result seems desirable as having removed impediments to the achievement of equitable dissolution. Although some state interest in enforcement of its criminal statutes will be partially frustrated, the net interference with local prosecution is probably no greater than that existing under former precedents which allowed insulation through invocation of the constitutional privilege.

Because the *Murphy* decision does not expressly deal with the *indirect* use of the bankrupt's testimony in a state prosecution, the rule that the immunity grant is inapplicable to such use continues to have effect. Therefore, legislative amendment to correct this infirmity must be effective in preventing introduction of indirectly disclosed evidence by *both* federal and local authorities. Since Congress has authority to define the scope of interest of federal administrative agencies, it can properly restrict the investigative techniques employed by those bodies.²² Similarly, congressional prerogative to effectuate an analogous restraint on *state* authorities would arguably flow from the preemptive power available under the Supremacy Clause.²³ Thus,

21. 378 U.S. 52 (1964). Although the facts before the Court raised the question of whether a defendant could refuse to testify in a *state* proceeding on the ground that his responses might be subsequently used by *federal* officials, the Court's announced rule was stated so broadly as to preclude state use of federal testimony. *Id.* at 79.

22. Congressional authority for the establishment of administrative agencies is usually identified as flowing from the enumerated powers of article I, § 8 of the United States Constitution. Thus, the power to create an administrative body may reasonably imply authority to specify the scope of its functioning, including the types of procedures it should observe in fulfilling the purpose for which it was formed.

23. U.S. CONST. art. 6, cl. 2.

each jurisdiction could be made to yield to the legislative desire to reserve in the bankruptcy court a power of examination sufficiently flexible to insure disclosure of all the debtor's significant prior transactions.

IV. WAIVER OF IMMUNITY

The question of whether a per se prohibition exists as to subsequent use of legitimately immunized testimony, or whether the bankrupt waives the immunity by a failure to affirmatively assert it, has also received considerable attention. Those who would prefer the former result argue that the language of the statute—"testimony . . . shall not be offered"—is not qualified and that, therefore, section 7(a) (10) disclosures are absolutely incompetent in a subsequent proceeding.²⁴ The judiciary has, however, largely resisted these arguments and concluded that an objection must be raised at a subsequent trial if the bankrupt desires to claim the benefits of the section. Some courts felt that a more literal construction would remove the debtor's right to consent to the use of his prior utterances, a result for which no policy or legislative support could be found.²⁵ Consequently, a reviewing court may assume, absent specific objection, that the defendant has acquiesced to the use of his immunized testimony. While the waiver or implied-consent rationale finds precedential support in other areas relating to the fifth amendment privilege,²⁶ it appears to be based on the need for efficient judicial administration rather than upon a realistic appraisal of the defendant's intent.

If the bankrupt were not required to assert his immunity, he could substantially reduce the risk of his conviction when immunized testimony was introduced in a criminal proceeding against him. If he did not receive a favorable verdict on the merits of his case, he could claim a mistrial as a result of the prosecution's misuse of his prior testimony. And if the prior testimony had been material to his conviction, the trial or reviewing court would seemingly be compelled to grant the request, thus allowing for the possibility that the prosecution would find the case unworthy of the time and financial expenditures involved in relitigation. These speculations as to the disruptive effect of a per se prohibition of immunized testi-

24. See *Bain v. United States*, 262 F. 664, 669 (6th Cir. 1920).

25. *Id.* See also *Schonfeld v. United States*, 277 F. 934 (2d Cir. 1921).

26. See 8 J. WIGMORE, EVIDENCE § 2276 (McNaughton ed. 1961).

mony may be mitigated by the fact that such a mandate would probably have the effect of increasing the caution exercised by prosecutors in subjecting bankrupts to criminal prosecutions. On the balance, however, the requirement that an objection be affirmatively raised seems consistent with accepted notions of the responsibility of the criminal litigant to provide for his own defense.

V. WAIVER OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Accompanying the judicial expansion of the scope of the fifth amendment privilege has been a reaffirmation that the right may be waived through either conscious rejection or a failure of timely assertion. A threshold question met in bankruptcy proceedings was whether a debtor who initiates proceedings to settle his estate—and thereby affirmatively requests the court to take over administration of his assets—has acquiesced to a probing into his past activities which might otherwise have been constitutionally protected. Proponents of this conclusion would apparently assert that the petitioner could be assumed to comprehend that the court proceeding would entail extensive examination.²⁷ These assertions have been rejected, however, on the ground that a failure to make sufficient revelation would produce a denial of discharge, a penalty which adequately encouraged cooperation without derogating fundamental liberties.²⁸ While recent judicial developments would question the assumed freedom with which discharge can be withheld for a bankrupt's refusal to make incriminating disclosure,²⁹ rejection of this waiver theory can be supported on a less vulnerable rationale.

Withholding the privilege from voluntary petitioners, while at the same time preserving it for those whose creditors initiate the proceedings, would clearly render the former a less desirable means through which to rectify financial instability. The debtor who might otherwise voluntarily file in bankruptcy would be encouraged to attempt continued management of his estate

27. See *United States v. Goldstein*, 132 F. 789, 791 (W.D. Va. 1904).

28. *Id.* While Collier's treatise on bankruptcy affirms that voluntary petitioners are entitled to assert the fifth amendment privilege, no direct support for this position is offered in the cited authority. See 1 W. COLLIER, *BANKRUPTCY*, ¶ 7.21 n.8 (Moore ed. 1967), citing *In re Scott*, 95 F. 815 (W.D. Pa. 1899).

29. See discussion entitled "Denial of discharge for invocation of the fifth amendment privilege" *infra*.

until an involuntary petition is submitted against him. Since he has presumably evidenced his inability to effectuate stable commercial transactions at the point at which a voluntary proceeding would have been initiated, perpetuation of his continued control of his assets finds little justification. Preserving the fifth amendment rights of all debtors thus promotes the equation of the two routes to bankruptcy.³⁰ This result was apparently intended by Congress, since section 7(a)(10) immunizes the testimony given during interrogation without qualification as to the type of petition filed. There would be no need to extend the statutory insulation to the debtor submitting a voluntary petition if he could be said to have no privilege against self-incrimination. While it might be urged that the unnecessary immunity was the result of governmental largess, such a conclusion has no historical support, for early immunity statutes in other contexts reflect religious attempts to restrict statutory protection within the scope required by then current Supreme Court pronouncements.³¹ Thus, the immunity proviso in the Bankruptcy Act more reasonably can be said to reflect a legislative assumption that the fifth amendment privilege was available irrespective of the procedure which yielded the debtor's appearance before the bankruptcy court.

VI. IMMUNITY IN EXAMINATIONS UNDER SECTION 21(a)

Congress, in its desire to provide the referee with sufficient information to achieve an equitable distribution of the bankrupt's

30. Although the requirements for resort to the two types of petitions vary substantially, see 1 W. COLLIER, *BANKRUPTCY*, ¶¶ 4.03, 4.14, the petitioner is generally subjected to the same procedural and substantive rules once he is before the court.

31. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the immunity grant of the Interstate Commerce Act, while upheld, was found to afford only limited immunity and, therefore, to justify invocation of the constitutional privilege as to unprotected matters. Shortly after that decision, the Act's immunity grant was revised. In *Brown v. Walker*, 161 U.S. 591 (1896), the Court scrutinized this new statute and only by a very broad reading of it was able to conclude that the legislative change had accomplished extrajurisdictional immunity. Thus, it appeared that although Congress attempted to conform to the Court's conception of full-breadth immunity, it was unwilling to use language which might be interpreted as providing immunity beyond constitutional requirements.

This legislative desire to meet only minimum constitutional standards is quite reasonable since excessively broad immunity would preclude otherwise legitimate prosecutions for criminal activity while returning to the government no information it could not otherwise have secured by resort to its contempt power.

assets, allowed for examinations under both section 7 and section 21.³² While the former is directed solely to the bankrupt, the latter may encompass interrogation of others:

The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court . . . to be examined concerning the acts, conduct, or property of a bankrupt . . .³³

A question soon arose as to whether the immunity extended to the debtor through section 7(a) (10) would also insulate him in a section 21(a) examination. Until recently, decisions specified that no immunity was to be available under the general examination provision. The courts reaching this result felt that the role of the bankrupt under section 21 was somehow different from that under section 7; for in the former, "the bankrupt [is] called merely as a witness [and] it is not made his duty to testify."³⁴

The phrasing of the two sections does not support a distinction based upon compulsion, for both merely call for submission to an examination. Although the section 7 review is mandatory in all proceedings while the section 21 interrogation provision must be invoked by application of an officer of the court, a creditor, or the bankrupt himself, the contempt power is readily available under section 21 to insure the most complete disclosure permissible under the fifth amendment.³⁵ The decisions which seek to draw this distinction may intend that *only* under section 7 can a bankrupt be made to testify to matters which would otherwise be protected by the fifth amendment. But even this analysis is unacceptable because it begs the essential question of whether testimony given in other than section 7 examinations might be immunized and thus not subject to a claim of constitutional privilege.

Similarly, to distinguish the debtor's role under the respective sections finds little support in current bankruptcy practice. Not only do the enabling provisions allow for examination on many identical matters,³⁶ but it also appears to be accepted pro-

32. See note 3 *supra*.

33. 11 U.S.C. § 44(a) (1964).

34. Goldstein v. United States, 11 F.2d 593, 594 (5th Cir. 1926). Accord, Cajiafas v. United States, 38 F.2d 3 (6th Cir. 1930); United States v. Epstein, 152 F. Supp. 583 (E.D. Pa. 1957). See also McCarthy v. Arndstein, 266 U.S. 34 (1924).

35. See United States v. Epstein, 152 F. Supp. 583 (E.D. Pa. 1957); 11 U.S.C. §§ 11(a), 13, 16 (1964) (contempt power).

36. In the § 7 interrogation, the bankrupt may be examined "concerning the conducting of his business, the cause of his bankruptcy, his

cedure for a bankruptcy court to issue an order to appear which purports to be based on both sections.³⁷ Moreover, despite the minor differences in the scope of applicability of the two examinations, both appear, as far as the bankrupt's testimony is concerned, to be aimed at the same objective: providing the court with procedures sufficient to insure full disclosure.³⁸

There has been a move in the Second Circuit, initiated by the late Judge Learned Hand, to assimilate sections 7 and 21 examinations. In *In re Bush Terminal Company*,³⁹ the circuit court was asked to decide whether a former corporate director could be made to answer for a bankrupt corporation's activities even though he had disassociated himself from the entity prior to its insolvency. While the majority concluded that he could only be made to testify in a section 21 examination, Hand considered the issue "academic" since "there is no difference . . . between the scope of the two [sections]."⁴⁰ The nature of the two sections in the context of the immunity grant was questioned in *United States v. Weissman*,⁴¹ where Hand asserted summarily that "the testimony [of the bankrupt] taken under section 21(a) of the Bankruptcy Act . . . was within the immunity granted by section 7(a) (10)."⁴² The most recent Second Circuit case in which the issue was raised is *United States v. Castellana*.⁴³ There the court strongly intimated that it would immunize a bankrupt's section 21 testimony, if incriminating and introduced in a subsequent criminal trial. However, it refused to insulate testimony read into the criminal record from depositions taken in connection with separate civil litigation, citing cases which have refused to expand the scope of the section 7 immunization grant.⁴⁴ Only one court other than the Second Circuit has adopted a similar

dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration . . . of his estate. . . ." Under § 21(a), inquiry is made into "the acts, conduct, or property of a bankrupt. . . ." Thus, the latter appears to vary mainly in its lack of specificity. See Lipkin, *Examinations under Section 21a of the Bankruptcy Act and Their Use in Subsequent Proceedings*, 25 REF. J. 38 (1951).

37. See, e.g., *In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939).

38. See Comment, *Applicability of the Immunity of Section 7(a) (10) of the Bankruptcy Act to Representatives of a Corporate Bankrupt*, 1959 DUKE L.J. 608, 614.

39. 102 F.2d 471 (2d Cir. 1939).

40. *Id.* at 472.

41. 219 F.2d 837 (2d Cir. 1955).

42. Hand offered no further elaboration of the rationale supporting his expansive view of § 7 immunity.

43. 349 F.2d 264 (2d Cir. 1965).

44. *Id.* at 274.

view of section 7(a) (10),⁴⁵ but the point is infrequently litigated.

Although the Second Circuit's construction conforms with the current view of practitioners regarding the purposes of the two types of examination, it is achieved only by disregarding that the statutory immunity grant is clearly connected to the section 7 interrogation without any textual reference which might indicate that a broader application was intended. Such a format implies that Congress did not intend the immunity grant to extend to section 21(a) examinations, but was willing to accept less pervasive disclosures under section 21. While this result may not be palatable in that it presumes a division of function which cannot be readily effectuated, a readjustment is probably best achieved through additional congressional action. Unfortunately judicial remedies such as that of the Second Circuit not only produce inconsistency within the federal courts but also, by providing a partial solution, relieve some of the pressure which might otherwise be felt by the proper legislative body.

VII. IMMUNITY OF REPRESENTATIVES OF A CORPORATE BANKRUPT

Prior to 1938, inconsistent judicial responses were given to the question of whether a corporate officer, director, or shareholder could claim the immunity given the "bankrupt" under section 7(a) (10).⁴⁶ When immunity was denied, of course, the representative could invoke his fifth amendment guarantees and refuse to make incriminating utterances. Apparently in response to the confusion surrounding allocation of the bankrupt corporation's section 7 obligations, Congress, in 1938, added section 7(b):⁴⁷

Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this Act.

Since this enactment, courts consistently have held that any person appropriately classified under section 7(b) could claim the immunity privilege of section 7(a) (10).⁴⁸

45. See *In re Alphin & Lake Cotton Co.*, 131 F. 824 (E.D. Ark. 1904).

46. Compare *Kaplan v. United States*, 7 F.2d 594 (2d Cir.), cert. denied, 269 U.S. 582 (1925), with *In re Hooks Smelting Co.*, 138 F. 954 (E.D. Pa. 1905).

47. 11 U.S.C. § 25(b) (1964).

48. See, e.g., *United States v. Weissman*, 219 F.2d 837 (2d Cir. 1955); *In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939).

Whether a former officer or director of a bankrupt corporation comes within section 7(b) and therefore can be made to answer on behalf of the corporation in a bankruptcy proceeding generally depends upon the availability of other knowledgeable sources of information within the shareholder or officer group existing at the time of bankruptcy. While some decisions have adopted arbitrary time limits according to which corporate capacity of former officers or directors is to be judged,⁴⁹ most seem to reflect a more qualitative evaluation of the likelihood that the former officer, director, or shareholder will possess information which is both relevant to the inquiry and unavailable from current representatives.⁵⁰

The phrasing of section 7(b) might seem to indicate that, absent a specific appointment of a corporate representative by the bankruptcy court, all current officers, directors, and shareholders bear equally the responsibility of performing the debtor's duties in a bankruptcy proceeding. Since by testifying, all would be complying with section 7(b), each representative might attempt to claim section 7(a) (10) immunity. In apparent recognition that such broad-based insulation was both unnecessary to securing adequate disclosure and undesirable in its preclusion of many criminal prosecutions, *United States v. Castellana*⁵¹ sought to limit immunity grants only to particular corporate rep-

49. In *In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939), the court upheld a former officer's resistance to an order for a § 7 examination. In the court's view, "one who has no authority to speak for the bankrupt at the time he is required to testify may not be compelled to submit to examination under that section." *Id.* at 471 (emphasis added). However, there appears to be a good faith limitation which would prohibit an officer or director from resigning his position in order to avoid having to appear before a referee. See *In re Bleecker*, 14 F.2d 1018 (S.D.N.Y. 1925) (corporate treasurer held in contempt for refusing to produce books after he had resigned his position upon receipt of a subpoena).

An Ohio district court would look not to the time of testimony, but rather to the point at which the petition was filed in making its determination that a former affiliate should fulfill a bankrupt corporation's obligations under the Act. See *In re Bell Refrigeration Corp.*, 169 F. Supp. 62 (N.D. Ohio 1958).

50. That bankruptcy courts are more interested in examining knowledgeable parties than in strictly observing legal relationships is illustrated by *United States v. Weissman*, 219 F.2d 837 (2d Cir. 1955). In that case, the real owner of the corporate bankrupt was neither an officer, director, nor shareholder of record. Yet, Learned Hand announced that the defendant could be made, pursuant to § 7(b), to act on behalf of the corporation, since "he was the only person financially interested in [the bankrupt] and he had absolute control of [its] conduct." *Id.*

51. 349 F.2d 264 (2d Cir. 1965).

representatives. Construing the phrase "as may be designated by the court"⁵² as an implicit expression of congressional intent not to immunize every witness connected with a bankrupt corporation, the court decreed that immunity could be claimed only by a representative "directed to appear by the bankruptcy court."⁵³

Thus, it would appear that section 7 can no longer be viewed as bestowing blanket immunity upon all corporate representatives. The facts of *Castellana* reveal that such a limitation is necessary to assure appropriate government officials the authority to mete out punishment to those who would use a corporate form with a view to intentional bankruptcy. To grant immunity to all participants in such a scheme, of course, seems only to further the instigators' attempts to abuse bankruptcy proceedings.

VIII. CONSTITUTIONAL PRIVILEGES RELATING TO THE FILING OF SCHEDULES PURSUANT TO SECTION 7(a) (8)

A. INAPPLICABILITY OF THE IMMUNITY GRANT

Among the bankrupt's duties under the Bankruptcy Act is the requirement that he file with the court, referee, and trustee, forms which are intended to reveal the types and identity of assets and creditors.⁵⁴ As early as 1913, the Supreme Court was called upon to determine whether immunity should be extended to these filings. In *Ensign v. Pennsylvania*,⁵⁵ it was concluded that the section 7(a)(8) schedule was not "testimony" within the meaning of the immunity grant. In support of this view, the observation was made that the schedule "may presumably be prepared at leisure and scrutinized . . . with care" before verified, while oral testimony is given in "a proceeding more or less unfriendly and inquisitorial" and thus likely to produce confusion and inaccuracies.⁵⁶ Inapplicability of the immunity grant meant that the full breadth of the fifth amendment privilege was available to the filer,⁵⁷ and since the section 7(a)(f) schedule system is the basic source of information for the bankruptcy

52. 11 U.S.C. § 25(b) (1964).

53. 349 F.2d at 273. The holding of the court indicates insulation will also be extended to an officer or director who, even without court direction, performs such specific duties as filing the schedules required under § 7. *Id.* at 274.

54. See Bankruptcy Act, § 7(a) (8), 11 U.S.C. § 25(a) (8) (1964).

55. 227 U.S. 592 (1913).

56. *Id.* at 599-600.

57. See *In re Naletsky*, 280 F. 437 (D. Conn. 1921).

court, the judiciary has subsequently been faced with consistent attempts to avoid the result of *Ensign* and thus has had occasion to carefully define the fifth amendment limitation.⁵⁸

B. WAIVER OF PRIVILEGE AGAINST SELF-INCRIMINATION

Shortly after *Ensign*, the Supreme Court met with another Governmental attempt to increase the utility of the filing system by circumventing the privilege against self-incrimination. In *McCarthy v. Arndstein*,⁵⁹ the appellant bankrupt resisted the lower court's finding that the filing of a section 7(a)(8) schedule constituted a waiver of the fifth amendment as to all incriminating matters revealed therein and as to evidence unearthed by investigators acting upon information disclosed. While subsequent citations of *McCarthy* have interpreted the case to hold that filing does not constitute a waiver,⁶⁰ the actual holding is not so simplistically stated. The Court, while finding no waiver on the facts before it, did not purport to present a per se rule. Rather, the Court intended to admonish other tribunals to dissect the contents of the filing to ascertain whether the bankrupt had disclosed facts sufficiently damning that, under existing precedents, he would not be allowed to refuse to reveal the totality of the incriminating matter.⁶¹ As to threshold incriminations the fifth amendment rights of the bankrupt were reaffirmed.

58. See *Czarlinsky v. United States*, 54 F.2d 889 (10th Cir. 1931); *Optner v. United States*, 13 F.2d 11 (6th Cir. 1926); *In re Arend*, 286 F. 516 (2d Cir. 1922); *In re Naletsky*, 280 F. 437 (D. Conn. 1921); *In re Podolin*, 202 F. 1014 (E.D. Pa. 1913).

59. 262 U.S. 355 (1923).

60. See, e.g., *Ashe, Immunity of Bankrupt Against Self-incrimination*, 71 Com. L.J. 38, 41 (1966).

61. 262 U.S. at 359. Under the rules applicable at the time *McCarthy* was decided, a witness was deemed to have waived his privilege as to a particular subject matter once he made an oral reference to any aspect of the topic. Thus, having testified as to some items in his inventory, the bankrupt could not refuse to disclose any other item held in his storeroom. See *In re Bendheim*, 180 F. 918 (S.D.N.Y. 1910). While one authority finds this doctrine viable today, see 8 J. WIGMORE, EVIDENCE § 2276, at 456 (Supp. 1964), it would seem subject to reevaluation in light of *Miranda v. Arizona*, 384 U.S. 436 (1966). In that case the Supreme Court announced specifically that a *criminal* defendant who has not consulted counsel retains a right to discontinue his responses at any point in an interrogation. Since the *Miranda* dictate was tied to the right-to-counsel question—an issue not yet fully developed in the bankruptcy context—the precedent would not fully repudiate the state of the law assumed in *McCarthy*.

C. DETERMINATION OF INCRIMINATORY NATURE

Recent decisions have further refined the bases upon which constitutional objections may be raised. It is now accepted that a broad and undefined claim of possible incrimination will not justify a refusal to file the required schedules.⁶² Such a view gains logical support from the fact that the totality of questions posed in the schedules is so diverse as to render quite unlikely the applicability of all to any single bankrupt.⁶³ Thus, a refusal even to designate those inquiries which are irrelevant can reasonably be interpreted as revealing a less than good faith attempt to meet the Act's request for disclosure.

The formulation of a procedure which both observes constitutional requirements and allows the bankruptcy court to ascertain the validity of a privilege asserted in good faith has been a perplexing problem. Courts recognized the need for such a procedure early in the development of the schedule system and espoused generalities which hopefully would guide a reviewing court.⁶⁴ Unfortunately, these decisions did not adequately define the role the bankrupt was to play in determining the incriminatory quality of particular utterances. On the one hand, there was a recognition that the fifth amendment right was highly personal and, in many of its applications, so absolute that even requiring a justification for its assertion would violate the intimacy intended to be preserved.⁶⁵ But at the same time, not only were the potential abuses of leaving complete discretion in the bankrupt made evident, but the judiciary sensed that the layman was ill-equipped to assess accurately the full legal implications of his responses to schedule questions.⁶⁶ Yet, not until 1963 was a specific system of verification outlined which found general acceptance in other tribunals. A Maryland district court, in *In re Mutual Security Savings & Loan Association, Incorporated*,⁶⁷ announced that the bankrupt's initial response to

62. See, e.g., *In re U.S. Hoffman Can Corp.*, 373 F.2d 622 (3d Cir. (1967)); *In re Arend*, 286 F. 516 (2d Cir. 1922).

63. For example, Schedule B-2 asks for a listing of the number of horses, cows, and sheep owned by the bankrupt.

64. See, e.g., *Czarlinsky v. United States*, 54 F.2d 889 (10th Cir. 1931); *In re Naletsky*, 280 F. 437 (D. Conn. 1921). See also *In re Podolin*, 202 F. 1014 (E.D. Pa. 1913) which states, "[w]hat is required is an effort in good faith by the bankrupt to file a schedule that obeys the act [sic] up to the point where the court can see that further obedience would violate the constitutional protection."

65. See *In re Naletsky*, 280 F. 437, 443 (D. Conn. 1921).

66. See *United States v. Lawson*, 255 F. Supp. 261 (D. Minn. 1966).

67. 214 F. Supp. 877 (D. Md. 1963).

the filing requirement was unsatisfactory, but instead of holding the debtor in contempt, he was

. . . directed to provide to the Court, in a sealed envelope, a statement by his counsel of the basis upon which [each] claim is invoked. Such sealed envelope shall be for the use of the Court only, and, after the envelope has been opened, the claim considered, and such further proceedings, if any, as may be indicated, taken, the statement shall again be sealed and be subject to examination only by any reviewing court to which [the bankrupt], being dissatisfied by the final disposition of this Court, may apply.⁶⁸

The subsequent acceptance of this procedure serves to emphasize the compromise wrought by it.⁶⁹ The initial disclosure by the bankrupt was insured confidentiality. Further, the burden of establishing the worthiness of the claim was placed on the proponent and could be used to uncover unfounded and misguided conceptions of possible incrimination. Finally, the format of the new system was sufficiently definite that the steps necessary to preserve the constitutional privilege could more accurately be anticipated than under previously ill-defined procedures for judicial review.

Despite the superficial attractiveness of the *Mutual Security* approach, the Third Circuit in *In re U.S. Hoffman Can Corporation*⁷⁰ found it constitutionally defective in at least three respects. First, the system went too far in requiring the claimant to justify his invocation of the fifth amendment. Rather than having to present a detailed "basis" for his assertion, the debtor need only reveal so much as to indicate to the judge that a full answer might incriminate him.⁷¹ The potential result of the procedure under review was to compel a bankrupt's disclosure against himself, and thus transgress the constitutional sanctity which the amendment was intended to preserve. Second, the requirement of a written statement in lieu of a personal appearance seemed to violate the court's understanding of the delicate and gradually more probing review a judge should undertake in assessing a claim of the privilege against self-incrimination. The judge has an "affirmative duty . . . to safeguard the constitutional privilege

68. *Id.* at 882.

69. Although the issue of protecting the bankrupt from incriminatory schedule disclosures is infrequently litigated, the two courts which reviewed the *Mutual Security* procedure in the period between its introduction and demise (see note 70 *infra*, and accompanying text) gave unequivocal endorsement to it. See *United States v. Lawson*, 255 F. Supp. 261 (D. Minn. 1966); *In re John Lakis, Inc.*, 228 F. Supp. 918 (S.D.N.Y. 1964).

70. 373 F.2d 622 (3d Cir. 1967).

71. *Id.* at 627-28.

when it is invoked and to be guided in making his determination by his personal perception of the peculiarities of the case in light of the surrounding circumstances."⁷² Apparently, inquiry should be made only to the extent that it reveals a reasonable possibility of incrimination. Finally, the Third Circuit rejected the secrecy of the *Mutual Security* system. Finding historical support for its condemnation of *in camera* review,⁷³ the court reasoned that a practice of secret disclosure

. . . is bound ultimately to beget a requirement of the maximum disclosure to prove the right to the privilege, in contrast to a proceeding in open court where the disclosure may be interpreted [sic] at the point where the right to the privilege becomes clear to the judge.⁷⁴

The spirit of the *Hoffman* court's scrutiny of the *Mutual Security* procedure is consistent with recent Supreme Court pronouncements concerning the sanctity of the fifth amendment privilege.⁷⁵ Somewhat troublesome, however, is the intimation that the right is so absolute that it precludes effective investigation of the validity of an invocation of the privilege. The revisions which *Hoffman* would require, in effect, leave the courts without a determination of the extent to which they can probe beyond an assertion of the fifth amendment right; for the court's conception of a step-by-step inquiry presumes a qualitative delineation between incriminatory and non-incriminatory utterances which does not appear to have a basis in fact. Thus, it is doubtful that a reviewing judge can accurately ascertain the existence of self-incrimination without a more general idea of the scope of the bankrupt's activities than *Hoffman* would permit. For example, the admission of ownership of a truck on a schedule of assets appears innocuous and, standing alone, would not seem privileged under fifth amendment standards. Even the fact that the truck was used to transport household appliances would indicate no incrimination. When placed in context of a bankrupt's association with known thieves and hi-jackers, however,

72. *Id.* at 628.

73. 8 J. WIGMORE, EVIDENCE § 2250 (Supp. 1964).

74. 373 F.2d at 628-29.

75. The Third Circuit reiterates with approval a statement by Justice Marshall in *United States v. Burr*, 25 F. Cas. 38, 40 (No. 14,692e) (C.C. Va. 1807):

It belongs to the court to consider and to decide whether any direct answer . . . can implicate the witness. If this be decided in the negative, then he may answer . . . without violating the privilege. . . . If a direct answer . . . may criminate himself, then he must be the sole judge what this answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be.

the description of even the truck may yield incriminating information which can be connected to collateral crimes. Yet, the *Hoffman* dictate would seem to require that a judge, without further inquiry into the actual use of the vehicles, decide at this point whether the fifth amendment would relieve the bankrupt from his duty to list the truck in his section 7(a) (8) schedule. In light of the presumed need of the bankruptcy court for all relevant information covering an estate, it would be preferable to allow the court to evaluate the *actual* connection between the debtor's ownership of the vehicle and his association with thieves, thus avoiding an excessively broad grant of constitutional insulation. While it can be hypothesized that conditioning the privilege upon a requirement that the bankrupt incriminate himself in order to establish the validity of his claim might be abused if used to furnish information to persons investigating collateral crimes, this potential abuse can be eliminated by an exclusionary rule prohibiting introduction of the incriminatory statements in a subsequent proceeding.⁷⁶

IX. BOOKS AND RECORDS UNDER THE FIFTH AMENDMENT

While the scope of the fifth amendment's protection in bankruptcy proceedings has generally corresponded with the expanding Supreme Court views of the privilege, one area—that concerned with a bankrupt's books and records as a source of incrimination—has been left largely unaffected. It was early decreed that a bankrupt had no right to protest the use in a subsequent criminal proceeding of information found in his business records, for under section 70(a) title to the records passed to the trustee upon the filing of a petition in bankruptcy.⁷⁷ While debtors protested that the practical effect was the same irrespective of whether the incriminating information was given in written or oral form, the Supreme Court announced in 1911 that, in its view,

. . . no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case . . . but of compelling him to yield possession of property that he no longer is entitled to keep.⁷⁸

This rule applies equally to individual and corporate bank-

76. See note 12 *supra*, and accompanying text.

77. See *Dier v. Banton*, 262 U.S. 147 (1923); *Johnson v. United States*, 228 U.S. 457 (1913); *In re Harris*, 221 U.S. 274 (1911).

78. *In re Harris*, 221 U.S. 274, 279 (1911).

rupts,⁷⁹ and the bankruptcy court officials are without statutory authority to enter into agreements with bankrupts to limit the use which may be made of confiscated documents.⁸⁰

Even those courts which have reevaluated former precedents in light of expanding constitutional privileges have accepted, without alteration, previous Supreme Court rules as to the unprotected nature of the debtor's books and records.⁸¹ However, this contemporary reception, to the extent it affects corporate bankrupts, conforms with decisions relating to the business papers of non-bankrupts. The Supreme Court has consistently ruled that a corporate officer can claim no immunity for the business records of his corporation.⁸² Denominated the "public records exception" to the fifth amendment, it is premised upon the view that the privilege is "personal" and protects only admissions by natural persons. Recordation of corporate transactions, even though performed by natural persons, is undertaken on behalf of the corporation.⁸³ Thus, even if the title-passing rationale of the bankruptcy cases were abandoned, representatives of bankrupt corporations could probably not expect to gain any greater access to the constitutional protection.

Equal treatment does not exist between bankrupt and solvent individuals, for the law allows the individual businessman to claim the privilege as to all of his business papers except those which are kept pursuant to a specific economic regulation.⁸⁴ Although such seemingly inconsistent results might be said to constitute classification without a rational basis, and therefore be

79. Compare *In re Fuller*, 262 U.S. 91 (1923), with *United States v. Hoyt*, 53 F.2d 881 (S.D.N.Y. 1931).

80. *In re Fuller*, 262 U.S. 91 (1923). Prior to 1964, when the fifth amendment had not yet been made applicable to the states, the Supreme Court chose to reject a debtor's attempt to resist subpoena of his records by a state authority for use in a local proceeding on the grounds that his "right . . . to protest against the use of his books . . . ceases as soon as his possession and control over them pass from him. . . ." *Dier v. Banton*, 262 U.S. 147, 149-50 (1923). Therefore, the rule of *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964), which extended the immunity grant to state criminal prosecution, does not alter the rule that there is no privilege against self-incrimination regarding books and records in the possession of the trustee.

81. See *In re Mutual Security Savings & Loan Ass'n, Inc.*, 214 F. Supp. 877, 883 (D. Md. 1963).

82. *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

83. See Davis, *The Administrative Power of Investigation*, 56 YALE L.J. 1111 (1947); Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951).

84. *Shapiro v. United States*, 335 U.S. 1 (1948); *Boyd v. United States*, 116 U.S. 616 (1886); Note, 68 HARV. L. REV. 340 (1954).

subject to constitutional infirmities, such a contention fails on two grounds. First, the clear intent of the Act, as evidenced by the provision allowing the trustee to take control of the debtor's records,⁸⁵ is to enter the documents into the public sector for scrutiny both by creditors and the court. Since, as one court has noted, the bankrupt can be presumed to comprehend the consequence of his failure to function successfully in a voluntarily-assumed commercial relationship with society,⁸⁶ he should not be heard to object that the making public of his records was against his will. Secondly, it might be contended that, in fact, there is a reasonable basis for distinguishing availability of the fifth amendment privilege to bankrupt and non-bankrupt individuals. Since the debtor has evidenced his inability to fulfill commercial obligations, there is a need for someone to step in and insure that the bankrupt's responsibilities to creditors are fulfilled as equitably as possible. The framers of the Constitution, in apparent recognition of this need, granted to Congress the power "to establish . . . uniform laws on the subject of bankruptcies . . ."⁸⁷ And, in order to assist a just distribution, the records which detail past dealings with creditors are reasonably withdrawn from the bankrupt's control.

Both of these arguments can be challenged by noting that the court's need for full disclosure of the materials encompassed in the debtor's books and records could be satisfied by a grant of immunity covering any incriminations found therein. Also, it might be argued that allowing congressional regulatory power to override fundamental privileges could, in its logical extension, totally emasculate those privileges. Thus, the need for complete disclosure to insure equitable distribution might effectively eliminate the fifth amendment's applicability to sections 7 and 21(a) examinations. However, given the established protections in most other areas of bankruptcy law, the "potential abuse" rationale is somewhat inappropriate. Business books and records play a critical role, both in assuring the trustee a reasonably efficient temporary management if he takes possession of the business, and in providing the referee with data

85. Bankruptcy Act, § 70(a), 11 U.S.C. § 110(a) (1964).

86. *United States v. Hoyt*, 53 F.2d 881, 885 (S.D.N.Y. 1931): "Thus, by coming through his own acts under the substantive law of insolvency, he has involved himself in a waiver of his right to claim that his papers should remain wholly inviolate. . . ."

87. U.S. CONST. art. I, § 8, cl. 4. See generally *THE FEDERALIST* No. 42; Kreft, *What is the "Subject of Bankruptcies"?*, 6 TEMP. L.Q. 141 (1932).

which will help locate assets and creditors. Unless an equally productive means of disclosure is adopted, the books and records exceptions to the fifth amendment, in the bankruptcy context, seems justifiable.

X. THE DENIAL OF DISCHARGE FOR INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE

Bankruptcy proceedings are designed to achieve two ends. First, creditors are to receive shares of the debtor's estate in accordance with the substantive rules of distribution. Second, even though creditors receive less than full satisfaction of their claims, the debtor may be discharged from further obligation to most of those with whom he has had previous commercial dealings. While a petition in bankruptcy ideally produces both results, the goals are separable since they are realized only upon satisfaction of distinct conditions.

A discharge may be denied if the bankrupt "refused . . . to answer any material question approved by the court; or . . . has failed to explain satisfactorily any losses of assets"⁸⁸ Construction of the language has led to the rule that invocation of the fifth amendment privilege may provide a basis for denial of discharge, and those courts that have done so have been uniform in their analysis of the justification for such a result. Typical is the view taken by the Second Circuit in *In re Dresser*:

We entertain no doubt that it is within the power of Congress to grant or to refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, . . . but is a matter of favor, to be accepted upon such terms as Congress sees fit to impose.⁸⁹

A more recent decision paraphrased the famous epigram of Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford*:⁹⁰ "[the bankrupt] had a constitutional right to refuse to answer the questions propounded . . . , but he had no constitutional right to a discharge in bankruptcy."⁹¹

88. Bankruptcy Act, §§ 14(c)(6), (7), 11 U.S.C. §§ 32(c)(6), (7) (1964). See generally Shailman, *Bankruptcy—Section 14(c)(7), Another Milestone on the Historical Road Toward Protecting the Creditor Against Dishonest Petitions*, 34 REF. J. 54 (1960).

89. 146 F. 383, 385 (2d Cir. 1906); accord, *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949); *In re Bauknight*, 14 F.2d 674 (S.D. Fla. 1926); *In re Weinreb*, 153 F. 363 (2d Cir. 1907); *In re Leslie*, 119 F. 406 (N.D.N.Y. 1903).

90. 155 Mass. 216, 220, 29 N.E. 517 (1892).

91. *In re Zaidins*, 287 F.2d 401, 402 (7th Cir. 1961), *aff'd* 182 F. Supp. 543 (E.D. Wis. 1960).

Denial of discharge for invocation of the fifth amendment may now be open to scrutiny in light of recent Supreme Court decisions regarding the establishment of onerous conditions upon resort to the privilege against self-incrimination. The most cogent basis for reevaluation was offered by the Court in *Garrity v. New Jersey*,⁹² where several policemen sought reversal of convictions gained through use of incriminating testimony given under threat of loss of their positions. The Court reversed the convictions on the ground that "the option to lose [a] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."⁹³ The majority also rejected the Holmes "right-privilege" distinction as inappropriate in consideration of the constitutional question before the court.⁹⁴

Initially the denial of a discharge in bankruptcy for invocation of the fifth amendment privilege seems vulnerable to the *Garrity* rationale, since the debtor, in a sense, is presented the same coercive option—he must either testify against himself or lose the opportunity to begin his financial life anew. Without the discharge, he may be subjected to continued garnishments and collection suits; but in order to gain a reprieve, he may be exposed to criminal prosecution. The *Garrity* decision prohibits the government from placing its citizens "between the rock and the whirlpool."⁹⁵ Yet, since *Garrity* is the culmination of a series of decisions dealing with the rights of public employees, its applicability to bankruptcy is not certain.

Commentators have identified the *Garrity* decision as a further exemplification of the doctrine of unconstitutional conditions: The government is forbidden "to condition its largess upon the willingness of the petitioner to surrender a right which he would otherwise be entitled to exercise as a private citizen."⁹⁶ Thus, contrary to *Dresser*, this view would not allow Congress to condition its "favors" upon any terms it desired. In order to avail himself of the benefits of this doctrine, however, the claimant "must demonstrate that the condition of which he complains is unreasonable in the special sense that it prohibits

92. 385 U.S. 493 (1967). See also *Spevack v. Klein*, 385 U.S. 511 (1967).

93. 385 U.S. at 497.

94. *Id.* at 499.

95. *Id.* at 496, quoting from *Stevens v. Marks*, 383 U.S. 234, 243 (1966).

96. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1446 (1968).

or abridges the exercise of a right protected by an explicit provision in the Constitution."⁹⁷ This prerequisite would seemingly present little difficulty in bankruptcy, however, since the bankrupt would simply point to the potential infringement upon his fifth amendment rights. While direct application of the doctrine of unconstitutional conditions would upset the bankruptcy decisions which allow a denial of discharge when the bankrupt relies upon the fifth amendment, the doctrine itself has been criticized for its failure to inquire further into governmental needs for the information acquired through abridgement of a constitutional privilege.⁹⁸

This call for an evaluation of governmental objectives is particularly pertinent in bankruptcy. Evident in decisions supporting a denial of discharge for failure to disclose material information is the view that the structure of the enactment reflects a congressional desire to extend the benefits of bankruptcy only to debtors who are "honest"—that is, willing to cooperate with the court in achieving a just settlement of the claims of creditors.⁹⁹ Thus, the debtor who may be concealing a significant part of his estate is not viewed as deserving of absolution from his financial obligations. Information about each of the debtor's prior significant transactions is needed to insure to creditors a satisfaction of their claims which is equitable in light of the bankrupt's limited resources.

Yet, it can be argued that a similarly strong policy supported the condition placed upon Officer Garrity's employment. The State of New Jersey argued that the preservation of the integrity of its local law enforcement—and thus preservation of local internal security—demanded that officers who misuse their positions be dismissed.¹⁰⁰ This policy, too, is based on a need for information—information without which unworthy policemen might be harbored. Thus if the need for disclosure in bankruptcy proceedings is no more compelling than that asserted by New Jersey, the *Garrity* result would indicate that denials of discharge may be held to infringe upon the fifth amendment protection.

The *Garrity* case may not be entirely probative of the bankruptcy issue, however, for the Court attempted only to remedy a

97. *Id.* at 1447.

98. *Id.* at 1448-49.

99. See, e.g., *In re Bauknight*, 14 F.2d 674 (S.D. Fla. 1926); *In re Leslie*, 119 F. 406, 410 (N.D.N.Y. 1903).

100. See *Garrity v. New Jersey*, 385 U.S. 493, 506-09 (Harlan, J., dissenting).

conviction based on coerced incrimination and was not faced with the issue of delineating the proper scope of governmental interest. The Court was not asserting that New Jersey could not dismiss unworthy officers but rather only that the procedure leading to dismissal could not provide criminal conviction as the only alternative for an officer under interrogation. However, the decision does renew the issue regarding the extent to which a bankruptcy court can deny a discharge for inadequate disclosure.

In analyzing this question, two extremes can be easily dismissed. A discharge should not be withheld merely because the debtor invoked the privilege at some point in his examination, for information sufficient to insure equitable settlement of creditor's claim might otherwise be present. On the other hand, a discharge should not be granted if the debtor refuses to answer all inquiries, since many questions may be so innocuous that a refusal to answer evidences a lack of good faith.¹⁰¹ Between these extremes, of course, lies the heart of the problem posed by *Garrity*.

Further refinement of a constitutionally acceptable basis for a denial of discharge would seem to require not only a further delineation of the breadth of disclosure necessary to achieve the objectives of the Act, but also an evaluation of feasible alternatives to direct disclosure by the bankrupt.¹⁰² The extent of disclosure needed to insure equitable settlement of creditors' claims cannot be presented with mathematical certainty, so any standard should be functionally based. Thus, the court should be allowed to withhold discharge until it is reasonably satisfied both that no assets which would produce a significantly greater return for creditors are being concealed, and that no undisclosed preferential transfers have been effectuated in violation of the Act. Such a functional rule leaves to the officer of the court discretion to evaluate the satisfactory nature of available information.

Yet, a mere finding of insufficient information would not seem to justify placing the bankrupt in the "incrimination-denial of discharge" dilemma. Rather, the court should be required to exhaust other available sources of information. The section 21(a) examination, which may be utilized for the interrogation of persons other than the bankrupt, would seemingly provide an appropriate alternative. Through this means, creditors, associ-

101. See note 63 *supra*.

102. Cf. *In re Harnik*, 151 F. Supp. 504, 512-13 (W.D. Ark. 1957).

ates, and the spouse of the bankrupt could be made to testify.¹⁰³ To insure that this source is fully utilized, the bankrupt should, on appeal, be entitled to reversal of a denial of discharge when the court fails to examine a party who reasonably might be thought to possess relevant information. When the court exhausts alternative informational channels and still believes that sufficient disclosure to achieve equitable resolution of creditor claims has not been made, then a denial of discharge would seemingly be proper.

While the language of some past decisions would not comport with the conditions suggested above,¹⁰⁴ the actual holdings of most cases seem to give adequate deference to the debtor's claim of privilege. What has been lacking, however, is a much needed reevaluation of the strictures of the statutory language which permits denial of a discharge. While such a reevaluation might be forthcoming from the judiciary, it could appropriately be included in a general legislative reconsideration of the adequacy of disclosure techniques. The particular difficulties raised by *Garrity* are notably related to the limitations of the present immunity grant in section 7(a)(10). If that proviso were amended to preclude indirect use of the debtor's oral testimony and to encompass disclosures made in section 7(a)(8) schedules, the bankrupt's resort to the fifth amendment privilege would be forestalled. Not only would such an expansion of immunity allow the court to secure the range of disclosure needed to insure equitable claim settlement, but also more broadly-based immunity would seemingly avoid the questions raised by *Garrity*, and render unnecessary resort to the unsettled right-privilege distinction.

XI. CONCLUSION

Operating under an immunity provision which traces its legislative origins to 1898, bankruptcy courts are called upon to respect the delicate balance between their need for disclosure and the debtor's fundamental constitutional privilege. Yet, because recent expansions of the scope of fifth amendment applicability

103. The suggestion that parties other than the bankrupt be relied upon to furnish pertinent information has been specifically rejected in *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 625 (3d Cir. 1967):

The Bankruptcy Court was entitled to have from the appellants themselves . . . the requisite information, which may well have differed from that which would have been available from creditors or accountants.

104. See, e.g., *In re Zaidins*, 287 F.2d 401 (7th Cir. 1961); *Kaufman v. Hurwitz*, 176 F.2d 210 (4th Cir. 1949).

have rendered the original legislative intent largely irrelevant, judicial decisions regarding section 7(a)(10) are now made without determination of the extent to which governmental authority should tolerate limitations on its right of prosecution. The needed guideline could be supplied, however, by extensive congressional reevaluation of the adequacy of the current immunity grant. The present scope of immunity may be found adequate. If, for example, it was revealed that techniques of investigation and discovery have so improved since 1898 that the importance of the role played by the debtor in bankruptcy disclosure is minimal, little justification would exist for allowing the bankrupt broadbased insulation from future prosecution. Or if the bankruptcy courts were given pervasive independent investigative powers—perhaps including authorization for field investigators or immunity grants to those other than the bankrupt—the referee might not need to rely upon the bankrupt as the primary source of information sufficient to insure an equitable estate settlement. If, however, it was determined that the bankrupt must continue to play the key role in these disclosures, several modifications of the present system are needed. Immunity should probably be extended to section 7 schedules since there exists much confusion both as to the protection available to the bankrupt and the type of procedure which may constitutionally be employed to verify the validity of a claim to the privilege. Further, it might be found desirable to specify that the “fruits” of incriminations revealed in section 7 examinations may not subsequently be used against the bankrupt. Finally, it would seem appropriate in light of present practice to specify that immunity extends to all of the bankrupt’s testimony without regard to whether it is elicited under section 7 or section 21(a).

Since reappraisal might reveal that some of the premises of current interpretations are unfounded, the crucial matter, of course, is not whether these suggestions are accepted. Rather, it would seem most important that the fifth amendment privilege of future bankrupts not be jeopardized by a continuation of piecemeal attempts to align bankruptcy practice with recent expansion in the scope of the amendment’s guarantee.

